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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ANTONIO ESCOBEDO, an individual,,

Plaintiff,

v.

COUNTRYWIDE HOME LOANS, INC., a
corporation; and DOES 1 through 20
inclusive,

Defendants.

CASE NO. 09cv1557 BTM(BLM)

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS; ORDER DENYING
MOTION TO STRIKE PUNITIVE
DAMAGES ALLEGATIONS**

Defendant Countrywide Home Loans, Inc. (“Defendant” or “Countrywide”), has filed a motion to dismiss Plaintiff’s Complaint for failure to state a claim. For the reasons discussed below, Defendant’s motion is **GRANTED** as to Plaintiff’s first cause of action for breach of contract and second cause of action for declaratory relief. Defendant’s motion is **DENIED** as to Plaintiff’s third, fourth, and fifth causes of action. Defendant has also filed a motion to strike Plaintiff’s punitive damages allegations. Defendant’s motion to strike is **DENIED**.

I. FACTUAL BACKGROUND

In February 2007, Plaintiff took out a loan that was secured by his home. (Compl. ¶ 15.) Plaintiff alleges that on a date unknown, Countrywide began acting as an agent for the

1 beneficiary of the loan and became the servicer of the loan. (Compl. ¶ 17.)

2 On April 17, 2009, Countrywide and Fannie Mae entered into a Servicer Participation
3 Agreement (“Agreement”) for the Home Affordable Modification Program under the
4 Emergency Economic Stabilization Act of 2008. (Ex. 1 to Compl.) The Agreement provided
5 that Countrywide shall perform the loan modification and other foreclosure prevention
6 services described in the Financial Instrument (attached to the Agreement) and the program
7 guidelines and procedures issued by the Treasury.

8 Plaintiff alleges that when he attempted a modification of his loan, Countrywide would
9 not provide him with a modification. (Compl. ¶ 20.) Plaintiff also alleges that after he
10 stopped making payments, Countrywide began harassing him in an attempt to collect
11 payments on the loan. (Compl. ¶ 21.)

12 Plaintiff asserts causes of action for: (1) breach of written contract; (2) declaratory
13 relief; (3) violation of California’s Rosenthal Fair Debt Collection Practices Act (“RFDCPA”),
14 Cal. Civ. Code §1788, et. seq.; (4) invasion of privacy; and (5) unfair business practices in
15 violation of Cal. Bus. & Prof. Code § 17200.

16 17 **II. STANDARD**

18 Under Fed. R. Civ. P. 8(a)(2), the plaintiff is required only to set forth a “short and plain
19 statement” of the claim showing that plaintiff is entitled to relief and giving the defendant fair
20 notice of what the claim is and the grounds upon which it rests. Conley v. Gibson, 355 U.S.
21 41, 47 (1957). A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should
22 be granted only where a plaintiff's complaint lacks a "cognizable legal theory" or sufficient
23 facts to support a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696,
24 699 (9th Cir. 1988). When reviewing a motion to dismiss, the allegations of material fact in
25 plaintiff’s complaint are taken as true and construed in the light most favorable to the plaintiff.
26 See Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). Although
27 detailed factual allegations are not required, factual allegations “must be enough to raise a
28 right to relief above the speculative level.” Bell Atlantic v. Twombly, 550 U.S. 544, 555

1 (2007). “A plaintiff’s obligation to prove the ‘grounds’ of his ‘entitle[ment] to relief’ requires
2 more than labels and conclusions, and a formulaic recitation of the elements of a cause of
3 action will not do.” Id.

4 5 **III. DISCUSSION**

6 **A. Breach of Contract**

7 Plaintiff attempts to sue on the Agreement as a third-party beneficiary. Countrywide
8 argues that Plaintiff lacks standing to sue because he is not an intended third-party
9 beneficiary. The Court agrees with Countrywide.

10 The Agreement is governed by and must be construed under federal law.
11 (Agreement, § 11A). In applying federal law regarding third-party beneficiaries, the Ninth
12 Circuit is guided by the Restatement of Contracts. See Klamath Water Users Protective
13 Ass’n v. Patterson, 204 F.3d 1206, 1210-11 (9th Cir. 2000). The Restatement on Contracts
14 explains:

15 (1) Unless otherwise agreed between promisor and promisee, a beneficiary of
16 a promise is an intended beneficiary if recognition of a right to performance in
17 the beneficiary is appropriate to effectuate the intention of the parties and . .
18 . (b) the circumstances indicate that the promisee intends to give the
19 beneficiary the benefit of the promised performance.

20 (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

21 Restatement (Second) of Contracts § 302 (1979) (“Restatement”).

22 “To sue as a third-party beneficiary of a contract, the third party must show that the
23 contract reflects the express or implied intention of the parties to the contract to benefit the
24 third party.” Klamath, 204 F.3d at 1211. “One way to ascertain such intent is to ask whether
25 the beneficiary would be reasonable in relying on the promise as manifesting an intention to
26 confer a right on him or her.” Id. (citing Restatement § 302(1)(b) cmt. d.).

27 The Ninth circuit cautions, “Parties that benefit from a government contract are
28 generally assumed to be incidental beneficiaries, and may not enforce the contract absent
a clear intent to the contrary. See Restatement § 313(2). ‘Government contracts often
benefit the public, but individual members of the public are treated as incidental beneficiaries

1 unless a different intention is manifested.’ Id. cmt. a.” Klamath, 204 F.3d at 1211.

2 In Klamath, the Ninth Circuit held that although a contract between the United States
3 and a dam operator operated to the irrigators’ benefit and was “undoubtedly entered into with
4 the irrigators in mind,” nothing in the contract evinced an intention of the parties to the
5 contract to grant the irrigators enforceable rights. Id. at 1211-12. The Ninth Circuit
6 explained, “[T]o allow them intended third-party beneficiary status would open the door to all
7 users receiving a benefit from the Project achieving similar status, a result not intended by
8 the Contract.” Id. at 1212.

9 As in Klamath, the Agreement was entered into in part for the benefit of qualified
10 borrowers and with these borrowers in mind. However, the language of the contract does
11 not show that the parties intended to grant qualified borrowers the right to enforce the
12 Agreement. Indeed, the Agreement specifies that it “shall inure to the benefit of . . . the
13 *parties to the Agreement and their permitted successors-in-interest.*” (Agreement, § 11.E.)
14 (emphasis added).

15 A qualified borrower would not be reasonable in relying on the Agreement as
16 manifesting an intention to confer a right on him or her because the Agreement does not
17 *require* that Countrywide modify eligible loans. The Agreement sets forth Home Affordable
18 Modification Program *Guidelines*. The Guidelines set forth eligibility requirements and states:
19 “Participating servicers are required to *consider* all eligible loans under the program
20 guidelines unless prohibited by the rules of the applicable PSA and/or other investor
21 servicing agreements.” (Compl., Ex. 1 at 42) (emphasis added). The Agreement does not
22 state that Countrywide must modify all mortgages that meet the eligibility requirements.

23 Qualified borrowers are incidental beneficiaries of the Agreement and do not have
24 enforceable rights under the contract. Therefore, Plaintiff lacks standing to sue for an alleged
25 breach of the Agreement. Defendant’s motion is **GRANTED** as to this claim.

26
27 **B. Declaratory Relief**

28 Defendant argues that Plaintiff’s declaratory relief claim is duplicative of the breach

1 of contract claim. In his opposition, Plaintiff agrees to forgo this claim in favor of the breach
2 of contract claim. Therefore, the Court **GRANTS** Defendant's motion as to this claim.

3
4 **C. RFDCPA**

5 Defendant argues that Plaintiff's RFDCPA claim should be dismissed because Plaintiff
6 has failed to allege sufficient facts to support such a claim. The Court disagrees.

7 Although Plaintiff's Complaint is not very detailed, it sufficiently alleges harassing
8 conduct that would violate Cal. Civ. Code §1788.11(d), (e) and § 1788.17 (by violating 15
9 U.S.C. § 1692b(2), (6)). Plaintiff alleges that Countrywide representatives continuously made
10 telephone calls to Plaintiff, contacting him at his workplace, home phone, and mobile phone.
11 (Compl. ¶¶ 21-23.) Plaintiff also alleges that although Countrywide was provided with the
12 name and phone number of Plaintiff's attorney, Countrywide representatives continued to
13 contact and harass Plaintiff and also contacted Plaintiff's employer. (Comp. ¶¶ 24-25.)

14 In addition, Plaintiff alleges that Countrywide failed to give him the notice required by
15 Cal. Civ. Code § 1812.700. (Comp. ¶ 50(d)). There is little else that can be pled with respect
16 to a failure to give notice.

17 Plaintiff has alleged sufficient facts to support a claim under the RFDCPA. Therefore,
18 Defendant's motion to dismiss is **DENIED** as to this claim.

19
20 **D. Invasion of Privacy**

21 Defendant seeks to dismiss Plaintiff's invasion of privacy claim on the ground that
22 Plaintiff has not alleged facts establishing (1) a sufficiently serious invasion of his privacy
23 interest; and (2) damages.

24 The essential elements of a claim for invasion of privacy are: (1) the defendant
25 intentionally intruded upon the solitude or seclusion, private affairs or concerns of the plaintiff;
26 (2) the intrusion was substantial, and of a kind that would be highly offensive to an ordinarily
27 reasonable person; and (3) the intrusion caused plaintiff to sustain injury, damage, loss or
28 harm. Cal. BAJI 7.20.

1 Repeated phone calls may rise to the level of an intrusion of privacy that supports a
2 cause of action. See Joseph v. J.J. MacIntyre Companies, LLC., 238 F. Supp. 2d 1158,
3 1169 (N. D. Cal. Dec. 12, 2002) (holding that given the number and pattern of telephone calls
4 alleged, there was a genuine issue of fact as to whether the plaintiff's privacy was invaded).
5 As discussed above, Plaintiff has alleged facts regarding repeated and continuous calls to
6 his home, work, and cell phone in addition to telephone calls to his employer. These facts
7 support a plausible claim of a substantial invasion of privacy that would be offensive to a
8 reasonable person.

9 As for damages, Plaintiff alleges that as a result of the invasions of privacy, he "was
10 harmed and caused great mental and physical pain." (Compl. ¶ 59.) This allegation is
11 sufficient to satisfy the element of damages. See Miller v. National Broadcasting Co., 187
12 Cal. App. 3d 1463, 1484-85 (1986) (explaining that where there is a wrongful invasion of
13 privacy, damages may be recovered for mental anguish alone).

14 Accordingly, Defendant's motion to dismiss is **DENIED** as to Plaintiff's invasion of
15 privacy claim.

16 17 **E. Cal. Bus. & Prof. Code § 17200**

18 Defendant argues that Plaintiff's § 17200 claim fails because it is premised on
19 Plaintiff's other claims, which fail to state a claim. However, Defendant's motion was denied
20 as to Plaintiff's RFDCPA and invasion of privacy claims. Therefore, Plaintiff has stated a §
21 17200 claim.

22 23 **F. Motion to Strike**

24 Defendant moves to strike Plaintiff's prayer for punitive damages and punitive damage
25 allegations on the ground that Plaintiff has failed to plead facts establishing that Defendant's
26 acts were oppressive, fraudulent, or malicious and has failed to plead facts establishing that
27 Defendant, as a corporate employer, is liable for any acts of oppression, fraud or malice.

28 However, under federal pleading requirements, malice and intent may be averred

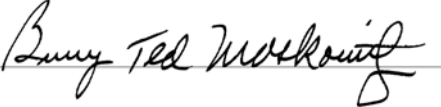
1 generally. Clark v. Allstate Ins. Co., 106 F. Supp. 2d 1016, 1020 (S. D. Cal. 2000). “[T]he
2 fact that California courts may impose a heightened pleading requirement on claims for
3 punitive damages is irrelevant, because such a requirement conflicts with federal procedural
4 law.” Robinson v. Managed Accounts Receivable Corp., ___ F. Supp. 2d ___, 2009 WL
5 2500571 (C.D. Cal. Aug. 4, 2009). Conclusory assertions of intentional and malicious
6 misconduct are sufficient to support a claim for punitive damages. Clark, 106 F. Supp. 2d
7 at 1020.

8 Plaintiff alleges that Defendants “willfully and intentionally intruded into Plaintiff’s
9 solitude, seclusion and private affairs by repeatedly and unlawfully attempting to collect a
10 debt” and that Defendants “acted with oppression or malice.” (Compl. ¶¶ 57. 60.) These
11 allegations are sufficient under federal pleading standards. Therefore, Defendant’s motion
12 to strike is **DENIED**.

13 14 **IV. CONCLUSION**

15 For the reasons discussed above, Defendant’s motion to dismiss is **GRANTED IN**
16 **PART** and **DENIED IN PART**. Defendant’s motion is **GRANTED** as to Plaintiff’s first cause
17 of action for breach of contract and second cause of action for declaratory relief.
18 Defendant’s motion is **DENIED** as to Plaintiff’s third, fourth, and fifth causes of action.
19 Defendant’s motion to strike Plaintiff’s punitive damages allegations is **DENIED**.
20 **IT IS SO ORDERED.**

21 DATED: December 15, 2009

22 
23
24 Honorable Barry Ted Moskowitz
United States District Judge